

EVIDENCE — DISCOVERY — Work product, generally
Revised 11/2009

Materials prepared by an attorney or by a member of the attorney's legal or investigative staff in anticipation of trial is generally privileged and protected from discovery. Rule 15.4(b)(1), Ariz. R. Crim. P. The work product doctrine originated in *Hickman v. Taylor*, 329 U.S. 495 (1947). In *Hickman*, the court established that work product may be in the form of *facts* or *opinions* gained or formed in anticipation of trial. *Id.* at 507. *Facts* are discoverable when (1) they are essential to the preparation of a party's case; and (2) the party seeking discovery can show adequate reasons for compelling the discovery. *Id.* at 511. However, *opinions* — including the attorney's "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs," and the like — cannot be discovered unless the party seeking them meets the burden of showing a much greater need for the information. *Id.*

In *Hickman*, a civil case, defense counsel interviewed witnesses in preparation for trial and prepared memoranda of these interviews. *Id.* at 498. The plaintiffs' counsel sought copies of those memoranda, asserting only that they wanted the memoranda to make sure they had not overlooked anything. The Supreme Court found that the plaintiffs made an insufficient showing of need for the memoranda to overcome the work product privilege. *Id.* at 512. The Court noted that under certain circumstances, such memoranda might be discoverable — for example, if the witnesses were no longer available — but the burden lies on the party seeking such materials to show need for them:

The general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of

our legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order.

Id.

Although the attorney work product doctrine is asserted more frequently in civil litigation, *see generally* Rule 26(b), Ariz. R. Civ. Proc., "its role in assuring the proper functioning of the criminal justice system is even more vital." *United States v. Nobles*, 422 U.S. 225, 238 (1975). In *Nobles*, during pretrial preparation, a defense investigator interviewed eyewitnesses and prepared a written report of their statements. During trial, when the witnesses testified for the prosecution, defense counsel used the report to aid in cross-examination. The prosecutor sought a copy of the report, but the trial court denied the request. *Id.* at 228. However, the court said that if the investigator himself were to testify, the court would provide a copy to the prosecution. After the prosecution rested, the defense called the investigator as a witness and the court ordered the defense to turn over the report. When the defense refused, the court precluded the investigator from testifying about the interviews. The Supreme Court upheld the trial court's preclusion order. *Id.* at 241. The Court held that the report was originally protected as work product. However, once the defense put the investigator on the stand, the defense waived its right to invoke the work product privilege. The trial court's preclusion order was "an entirely proper method of assuring compliance with its order." *Id.* *Nobles* thus established that the work product doctrine protects materials prepared before trial by agents of the attorneys just as it protects material prepared by the attorneys themselves. The privilege may, however, be waived at trial.